BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ELIZIA GONZALEZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 216,281
TOMMASSI'S OF WICHITA, INC.	)	
Respondent	)	
AND	)	
	)	
NORTHWESTERN NATIONAL CASUALTY	)	
Insurance Carrier	)	
	)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Jon L. Frobish on April 30, 1999. The Appeals Board heard oral argument October 8, 1999.

APPEARANCES

Dennis L. Phelps of Wichita, Kansas, appeared on behalf of claimant. James A. Cline of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded benefits for an 87.5 percent work disability based on an average weekly wage of $210 per week. Respondent asks for review of both average weekly wage and nature and extent of disability. As to wage, the ALJ found claimant had terminated employment with respondent and returned under a new contract shortly before the accident. To compute the wage, the ALJ used only the period after claimant returned to employment with respondent. Respondent argues the wage should be based on the entire 26 weeks before the date of accident, a period that includes time before claimant was rehired. Respondent also argued claimant was a part-time employee. As to nature and extent of disability, respondent contends claimant has not proven any

permanent injury and, in any event, should be limited to functional impairment because, according to respondent, claimant failed to make a good faith effort to find employment. Respondent also argued that claimant did not present admissible evidence of the task loss.

Claimant agrees with the ALJ's findings on average weekly wage. Claimant disagrees with the ALJ's findings on work disability. Claimant argues she is permanently and totally disabled. Finally, claimant contends respondent underpaid the temporary total disability benefits and respondent should pay at the rate of $140 based on a wage of $210.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds that the Award entered on April 30, 1999, should be affirmed.

Findings of Fact

1. Claimant was injured August 10, 1996, when she fell at work while performing her duties as a dishwasher. Respondent stipulated to the elements of compensability but denies permanent injury.

2. Claimant received treatment first at the Minor Emergency Center and then from Dr. Pedro A. Murati and ultimately Dr. Anthony G. A. Pollock. Dr. Murati initially became the court-ordered authorized physician.

3. Dr. Murati first saw claimant September 30, 1996. Claimant reported the fall at work, landing on her knees and elbows and twisting her back. Dr. Murati performed a physical examination and found probable left knee ligament damage, lumbosacral strain with questionable radiculopathy, probable partial tear of the Achilles tendon, cervical strain, probable carpal tunnel syndrome, and right olecranon bursitis.

Dr. Murati last saw claimant August 24, 1998. His final diagnosis was lumbosacral strain with bilateral radiculopathy, morbid obesity, and mild crepitus of the left wrist. He rated the work-related injury as 11 percent impairment of the whole person. This rating did not include obesity. This rating also did not include impairment to claimant's knee. Dr. Murati had referred claimant to Dr. Pollock for the knee problem. Although Dr. Murati did not rate the knee, he testified that if Dr. Pollock's rating on the knee were added to his rating for the other injuries, the result would be a total rating of 15 percent of the whole person.

Dr. Murati also recommended, as described in his report of August 24, 1998, the following work restrictions:

> Based on an eight hour work day, occasional sit, bend, climb stairs, squat, drive, repetative [*sic*] hand controls with the left, repetative [*sic*] grasp with the left.

> Frequent stand, walk. No climbing ladders, crawl heavy grasp with the left. Use of good body mechanics at all times. These restrictions do not include the knee.

Dr. Murati's release to work also showed lift/carry limits and push/pull limits of 20 pounds occasionally, 10 pounds frequently, and 5 pounds constantly.

Dr. Murati reviewed a list of tasks prepared by Mr. James T. Molski and testified claimant cannot now do 9 of the 12 tasks claimant has done during the 15 years before this accident. Dr. Murati also testified that in his opinion claimant is essentially and realistically unemployable.

4. Dr. Pollock first saw claimant February 24, 1998, for complaints of bilateral knee pain worse on the left after the fall in August 1996. An MRI showed probable medial lateral meniscus tear. Dr. Pollock performed arthroscopic surgery on the right knee on March 30, 1998, and found degenerative arthritis with degenerative lateral meniscal tear and some osteophytes on her patella.

Dr. Pollock rated the impairment as 10 percent of the left extremity or 4 percent of the whole person. But Dr. Pollock testified it would be difficult to relate this impairment to claimant's injury at work. Dr. Pollock described claimant's knee problems as degenerative and not likely from the fall at work. But Dr. Pollock also stated that in his opinion the fall probably aggravated the preexisting condition in claimant's knee.

Dr. Pollock recommended restrictions limiting claimant's squatting, bending, and climbing. He also agreed claimant would have difficulty carrying 30 pounds or lifting 30 pounds if she had to squat to any degree to do the lifting. He opined that claimant had the ability to return to work with minimal restrictions.

Dr. Pollock reviewed a list of tasks prepared by Ms. Karen C. Terrill. He agreed with Ms. Terrill's conclusion on the tasks claimant cannot now do.

5. Mr. Molski testified that he met with claimant on December 21, 1998, and obtained from claimant a description of the jobs claimant had done and from that description prepared a list of tasks. He also offered his opinion that claimant would represent a significant job placement challenge. His report adds that there is a likelihood that "absent further specific skill development, that a return to competitive employment could not be accomplished."

6. Ms. Terrill also prepared a task list from information claimant provided her. She identified 13 tasks and opined that, based on Dr. Pollock's restrictions, claimant would not be able to do 2 of the 13, or 15 percent. Applying Dr. Murati's restrictions, she eliminated 3 of the tasks for a 23 percent loss.

Ms. Terrill opined that claimant should be able to find employment and earn minimum wage or $5.15 per hour for a 40-hour week.

7. Claimant has a sixth-grade education and speaks very little English. She has worked as a field and harvest worker, as a dishwasher, and as a babysitter.

8. Claimant initially worked for respondent from sometime in April 1996 through sometime in June 1996. At that time she was paid $5 per hour. Claimant then briefly left employment for respondent, not knowing if she would return. She did return July 22, 1996, and when she returned, the new agreement was for her to work 35 hours per week at $6 per hour. Claimant testified there was no set number of hours considered full time.

9. The Board finds claimant sustained permanent injury, including aggravation of her knee, and as a result was unable to return to work earning 90 percent or more of the wage she was earning at the time of the injury.

10. At her regular hearing on December 15, 1998, claimant identified 18 places she had applied for employment since this injury.

11. Claimant was paid temporary total disability benefits for 100 weeks in the total amount of $10,896.90.

Conclusions of Law

1. Claimant has the burden of proving her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. Claimant's average weekly wage was $210 per week. Claimant left employment and then returned under a new agreement. The new agreement called for $6 per hour for 35 hours per week. Claimant has not shown she was a full-time employee. K.S.A. 44-511.

3. Claimant is entitled to an award for work disability. K.S.A. 1999 Supp. 44-510e.

4. K.S.A. 1999 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

5. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

6. Claimant has a 100 percent wage loss. Claimant has not been able to find employment and the Board finds that under the circumstances of this case, claimant's efforts to find employment should be considered a good faith effort. As the ALJ points out, claimant has very limited options. Under these circumstances, her limited efforts should be treated as good faith.

7. The Board finds claimant has a 75 percent task loss. This conclusion is based on the testimony of Dr. Murati from the task list prepared by Mr. Molski. The Board concludes this task list is properly in evidence as Mr. Molski testified he obtained the information from claimant and claimant was available for cross examination on the list.

The Board has not relied on the task loss opinion of Dr. Pollock because he has considered only the knee injury. He did not apply restrictions for other injuries identified by Dr. Murati, the initial treating physician.

8. Claimant has an 87.5 percent work disability.

9. Claimant was underpaid temporary total disability benefits. The 100 weeks of benefits were paid at the rate calculated from an incorrect average weekly wage. The correct amount of temporary total disability benefits should be $14,001 based on $140.01 per week for 100 weeks.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on April 30, 1999, should be, and the same is hereby, affirmed.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Elizia Gonzalez, and against the respondent, Tommassi's of Wichita, Inc., and its insurance carrier, Northwestern National Casualty, for an accidental injury which occurred August 10,

1996, and based upon an average weekly wage of $210, for 100 weeks of temporary total disability compensation at the rate of $140.01 per week or $14,001, followed by 288.75 weeks at the rate of $140.01 per week or $40,427.89, for an 87.5% permanent partial disability, making a total award of $54,428.89.

As of April 28, 2000, there is due and owing claimant 100 weeks of temporary total disability compensation at the rate of $140.01 per week or $14,001, followed by 93.86 weeks of permanent partial disability compensation at the rate of $140.01 per week in the sum of $13,141.34, for a total of $27,142.34, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $27,286.55 is to be paid for 194.89 weeks at the rate of $140.01 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of April 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Phelps, Wichita, KS
James A. Cline, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director